



U.S. Department of Justice
Justice Management Division

DAG-12b

Washington, D.C. 20530

APR 17 2009

MEMORANDUM

TO:



FROM:

Lee J. Lofthus
Assistant Attorney General for Administration and
Designated Agency Ethics Official

SUBJECT: Participation in Matters Relating to Executive Orders Concerning Detainee Review, and Policies on Detention, Interrogation and Transfer

The purpose of this memorandum is to consider, under the standard of conduct on impartiality, 5 C.F.R. § 2635.502, the scope of the recusal that might be required, and to make a determination with respect to your participation in certain matters relating to the work of the task forces established by the President's Executive Orders to address matters and policies affecting detainees, detention and interrogation policy, and Guantanamo Bay Naval Base.

On January 22, 2009, the President issued three separate Executive Orders (Review of Detention Policy Options; Ensuring Lawful Interrogations; and Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities) and one Presidential Memorandum (review of the detention of Ali Saleh Kahlah al-Marri) that place a number of responsibilities on the Department of Justice, in general, and the Attorney General, in particular. The responsibilities for the Department contemplated by these Orders and the Memorandum are substantial in scope and of vital importance to the mission of the Department. They cut across components and will require significant, ongoing involvement by senior members of the leadership offices.

The review processes contemplated in each Order and the Memorandum are to be led or coordinated by the Attorney General and involve numerous interagency participants (DOD, DOS, DHS, DNI, DCI, Joint Chiefs). The Orders themselves detail a process that will involve a number of steps (i.e. assembling voluminous documents; legal and policy review/analysis; formulating options and presenting them for decision by a Principals' level group).

Given the interagency process contemplated in each Order, the Department has created interagency task forces to address each of the responsibilities identified for both the Attorney

General and the Department as a whole. The Executive Orders provide that the Attorney General (or his designee) is the coordinator of the Guantanamo Detainee Review process, the co-chair of a special task force on detention policy and the chair of the special task force on interrogation policy. The responsibilities entrusted to the Attorney General and the Department by these Executive Orders are significant in nature, a top priority for the Department (having been issued on January 22, 2009 two days after the President took office) and are vital to the Department's mission and to national security issues.

The Attorney General has established three interagency processes and task forces to address the work prescribed under the Executive Orders. He has designated senior representatives from the Department to lead these efforts. Two of these individuals report to the Attorney General through the Deputy Attorney General consistent with the normal operational mission and function of the Department of Justice, the third reports directly to the Attorney General.

- 1) The Attorney General has designated Matthew Olsen to be the Executive Director of the Guantanamo Detainee Review Task Force, and report to the Attorney General. This Task Force is responsible for assembling and examining relevant information and making recommendations regarding the proper disposition of each individual currently detained at Guantanamo Bay. In accordance with the President's Order, the Task Force will consider whether it is possible to transfer or release detained individuals consistent with the national security and foreign policy interests of the United States; evaluate whether the government should seek to prosecute detained individuals for crimes they may have committed; and, if none of those options are possible, the Task Force will recommend other lawful means for disposition of the detained individuals. The Order provides that the Attorney General shall coordinate this review in conjunction with the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff in order for the detention facilities at Guantanamo Bay to be closed within one year from the date of the Executive Order. The Executive Director and the other senior representatives from the agencies identified in the Executive Order will receive recommendations from review teams consisting of representatives from the Justice Department and the other agencies identified in the President's Order. These multi-agency teams will conduct the specific detainee reviews and develop options and recommendations for the Executive Director to present to the Review Panel consisting of senior-level officials from each of the relevant Departments and agencies who are authorized to make decisions as to the disposition of each detainee. Review Panel members will be responsible for ensuring that each department or agency devotes the necessary resources so that the Task Force can conduct this review and enable closure of the facility within the one-year time frame required under the Executive Order.
- 2) The Attorney General has designated Brad Wiegmann, currently the Chief of Staff and Principal Deputy in the National Security Division to lead (along with a representative

from the Department of Defense) a Special Task Force on Detention Policy. In accordance with the President's Executive Order, this interagency task force is charged with conducting a review of the lawful options available to the federal government for the apprehension, detention, trial, transfer, release or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations. The Order provides that the Attorney General and the Secretary of Defense, or their designees, will co-chair the Task Force. Other task force participants include representatives of the Secretaries of State and Homeland Security, the Director of National Intelligence, the Director of the Central Intelligence Agency, the Chairman of the Joint Chiefs of Staff, and other officials as determined by the Co-Chairs. This Task Force will provide policy options to a Principals' level group, to include the Attorney General, and will ultimately provide a report to the President.

- 3) The Attorney General has designated J. Douglas Wilson, the Chief of the National Security Unit in the U.S. Attorney's Office for the Northern District of California to lead the Special Task Force on Interrogation and Transfer Policies. In accordance with the President's Executive Order, this interagency task force is charged with conducting a review to determine whether the Army Field Manual interrogation guidelines, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence to protect the nation, and whether different or additional interrogation guidance is necessary. The task force is also responsible for examining the transfer of individuals to other nations in order to ensure that such practices comply with all domestic and international legal obligations and are sufficient to ensure that such individuals do not face torture or inhumane treatment. The Order provides that the Attorney General or his designee shall serve as the Chair of the task force and that the Director of National Intelligence and the Secretary of Defense, or their designees, shall serve as Co-Vice-Chairs. Other members of the task force include representatives of the Secretaries of State and Homeland Security, the Director of the Central Intelligence Agency, the Chairman of the Joint Chiefs of Staff and other officials as determined by the Chair. This Task Force will provide policy options to a Principals' level group, to include the Attorney General, and will ultimately provide a report to the President.

Conflict of Interest Statute and Standards of Conduct

The standard of conduct at 5 C.F.R. § 2635.502 requires an official to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under Section 502, an official generally will not participate in any particular matter involving specific parties in which a person with whom the employee has a "covered relationship" is a party or represents a party. Included in the definition of a "covered relationship" is any person for whom the official served, within the preceding year, as officer, director, trustee, general partner, agent,

attorney, consultant, contractor or employee. 5 C.F.R. § 2635.502(b)(1)(iv). You have a covered relationship with your former firm, [REDACTED]

[REDACTED] You did not participate in any of these matters while you were employed by the firm, and you have no confidential information concerning these matters. You do not seek to participate in reviewing any individual detainee matters in which your former firm represents a party. However, in performing assignments from the Deputy Attorney General to assist him in his role as the operational chief for the work of the task forces described above, your participation in evaluating and making recommendations concerning individual detainee matters or policy issues, may affect the individual matters in which [REDACTED] represents a detainee or other party.

The work of the Detention Policy and Interrogation and Transfer Policy task forces primarily concern matters of general applicability, and not particular matters with specific parties. However, it is likely that the work of the task forces will inform policy decisions that will affect positions taken in habeas litigation, possibly including those in which your former firm represents a party. It also seems likely that a level of coordination will be required among the work of all three task forces on those issues common to them. Therefore, to the extent that your participation in evaluations or recommendations on specific matters or policy issues will affect individual matters in which your former firm represents a party, a determination that such participation is authorized is appropriate in order that you may participate in the legal and policy determinations required in these efforts.

The Department has applied the general standard in the impartiality regulation, whether a reasonable person with knowledge of the relevant facts would question his impartiality in performing his official duties, in circumstances such as these, where participation in other specific related matters, or in general decisions, may affect particular matters with parties from which the individual is recused. 5 C.F.R. § 2635.502.

I believe that concern regarding undue influence on a Federal official from a former employer is substantially ameliorated under circumstances such as those presented here, where a broad range of policy and legal issues are being addressed which ideally, perhaps even necessarily, must be considered as a whole; and where your participation will be under the supervision of senior Department officials who are charged with responsibility for the overarching policy and legal decisions that will be made in fulfilling the important requirements set forth in the executive orders. In addition, the number of matters which fall within the scope of the work of the task forces, and the fact that former firms of a significant number of attorneys in the leadership offices are representing individual detainees, has created the potential for recusal of a substantial number of officials in these offices, primarily ODAG. The experience and judgment of these attorneys, including yourself, is vital to the discharge of the Department's responsibilities under the

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executive orders. In addition, I also considered important that you do not seek authorization for direct contact with your former firm.¹

Finally, you have advised that



CONCLUSION: For the reasons set forth above, I conclude that you may participate in recommendations and decisions related to the disposition of detainees, except in those specific matters from which you are recused, and you may participate in all related policy and other matters arising from the work of the three interagency task forces described above. You remain recused from decisions relating specifically to the disposition of particular detainees represented by your former firm or in which your former firm represents a party in a specific detainee's particular matter.

cc: Deputy Attorney General

¹E.O. 13490 of January 21, 2009, Ethics Commitments by Executive Branch Personnel, generally requires a political appointee for a period of two years after appointment to recuse from any meeting or other communication with the appointee's former firm where the meeting or communication relates to the performance of the appointee's official duties. E.O. 13490, Sec. 2(h). Therefore, should you wish to communicate with [REDACTED] concerning these matters you should seek a waiver under E.O. 13490 prior to doing so.



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relationship with your former firm, [REDACTED]

[REDACTED] You did not participate in any of these matters while you were employed by the firm, and you have no confidential information concerning these matters. You do not seek to participate in reviewing any individual detainee matters in which your former firm represents a party. However, in performing assignments from the Deputy Attorney General to assist him in his role as the operational chief for the work of the task forces described above, your participation in evaluating and making recommendations concerning individual detainee matters or policy issues, may affect the individual matters in which [REDACTED] represents a detainee or other party.

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direct contact with your former firm.¹

You also have a covered relationship with your spouse's employer. [REDACTED]

Therefore, you are recused, unless authorized, from participating in any matter in which your spouse represents a party, [REDACTED]

5 C.E.R. § 2635.502(h)(1)(ii) [REDACTED]

Finally, you have advised that [REDACTED]

CONCLUSION: For the reasons set forth above, I conclude that you may participate in recommendations and decisions related to the disposition of detainees, except in those specific matters from which you are recused, and may participate in all related policy and other matters arising from the work of the three interagency task forces described above. You remain recused from decisions relating specifically to the disposition of particular detainees represented by your former firm or in which your former firm represents a party in a specific detainee's particular matter, and from any matter in which your spouse represents a party, [REDACTED] is or represents a party, unless authorized.

cc: Deputy Attorney General

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